IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

CHAN YOUNG LEE, *et al.*,	:	
	:	
Plaintiffs,	:	
	:	
v.	:	C.A. No. 02C-10-280(CHT)
	:	
CHOICE HOTELS INTERNATIONAL INC.,	:	
	:	
Defendant/Third-Party Plaintiff,	:	
	:	
v.	:	
	:	
P.T. MARINA CITY DEVELOPMENT and P.T. QUALITA INDAH HOTELS,	:	
	:	
Third-Party Defendants.	:	

OPINION AND ORDER

On Defendant's Motion to Strike the Testimony of Thomas C. Ebro

Submitted: October 27, 2005
Decided: March 24, 2006

Nancy Chrissinger Cobb, Esquire, CHRISSINGER & BAUMBERGER, Three Mill Road, Suite 301, Wilmington, DE 19806, **Attorney for the Defendant.**

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STATEMENT OF FACTS AND NATURE OF THE PROCEEDINGS

Before the Court is the Defendant's motion to exclude the Plaintiffs' expert witness, Thomas C. Ebro, based upon Delaware Rule of Evidence 702 in light of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[1] and its Delaware progeny.[2] The motion was filed on May 19, 2005. The Plaintiffs responded on June 1, 2005. The parties agreed to proceed to a hearing on the memorandum submitted. That hearing began on June 15, 2005, but was interrupted to allow the parties to supplement discovery. It was resumed and completed on July 6, 2005. Supplemental memoranda were simultaneously filed by the parties on July 15, 2005, and oral argument was subsequently presented. The motions were then taken under advisement.

As noted in prior proceedings, the Plaintiffs, Bo

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[1] 509 U.S. 519 (1993).

[2] *Goodridge v. Hyster Co.*, 845 A.2d 498 (Del. 2004); *Eskin v. Carden*, 842 A.2d 1222 (Del 2004); *Cunningham v. McDonald*, 689 A.2d 1190 (Del.1997); *Nelson v. State*, 628 A.2d 69 (Del. 1993).

Hyun Lee and Wan Ki Kim, along with their sons, Young Min Lee and Chan Young Lee, left their home in Seoul, South Korea to enjoy a vacation tour of Southeast Asia. Their journey began on May 4, 2001, and ended on May 6, 2001, when Chan Young nearly drowned while playing in the swimming pool at the Quality Resort Waterfront City. The family had just arrived at the resort earlier in the day. Litigation was ultimately initiated against Choice and on behalf of the Lees, on October 30, 2002.[3]

Mr. Ebro's association with the case began with his retention by counsel for the Lees on August 24, 2004, as an expert in "aquatic safety". He was retained for purposes of reviewing the near drowning of Chan Young based upon his training, education and experience in that field. Specifically, he was to determine what led up to the event, what caused it and how the event could have been avoided.

Mr. Ebro is a 1965 graduate of the University of

[3] The facts are more particularly described in the opinion filed by the Court in response to the Defendant's motion to dismiss on *forum non conveniens* grounds dated March 21, 2006. The statement of the facts in this case will be limited to those pertinent to the instant motion.

Oregon with an undergraduate degree in Recreation Management and Aquatic Safety. For the next twenty years, with limited exception, he was employed in aquatic related activities, including safety administration, training and pool operation. He also acted as a deputy coroner for the County of Los Angeles, California and trained others in underwater recovery and investigatory protocol. From there, Mr. Ebro began managing resorts in the Caribbean Sea which featured specialized diving operations, among other activities, before opening his firm, Aquatic Risk Management, in 1985.

As an aquatic safety specialist with particular expertise in recreational pools, Mr. Ebro routinely reviews claims involving injuries received in connection with swimming pool accidents. Those incidents have involved or taken place at resorts both within and outside the continental United States.[4] It further appears that he has investigated and/or provided expert

[4] Based upon the affidavit which he submitted, Mr. Ebro has been involved in cases in forty-seven states and eleven countries. The eleven countries are comprised of ten nations in the Caribbean or Central America, and Canada. It does not appear that he has been involved in cases outside of the Western Hemisphere, generally or in Southeast Asia, in particular.

opinions in over 1,200 federal and state court cases.

Along with his experience and education, Mr. Ebro has maintained memberships in a large number of professional organizations related to aquatics and aquatic safety. They include the National Spa and Pool Institute which later became a part of, or affiliated with, the American National Standards Institute to form an entity referred to by the acronym "ANSI/NSPI". ANSI/NSPI is an umbrella group consisting of commercial organizations worldwide involved in the pool industry. As part of its role, the group sets guidelines for pool operation and safety which are alleged to be international in scope as well as application.

On August 27, 2004, three days after his retention, Mr. Ebro executed an affidavit outlining the substance of the opinions he held at that time. At that time, he reviewed the materials sent to him by the Lees' attorneys, including the available pleadings, discovery responses and other materials related to the incident and the resort itself. On April 4, 2005, Mr. Ebro was deposed by counsel for Choice. That deposition was

followed by his testimony at the June 15 and July 6, 2005 *Daubert* hearings.

Additional documents and other evidence were supplied to Mr. Ebro after he executed his August 27 affidavit which helped him form the opinions about which he testified. Between March 3 and March 9, 2005, he visited Batam, Indonesia as well as Singapore, an independent republic. Nine resorts and/or hotels of comparable quality and size were visited while in Indonesia. The number visited in Singapore is unclear.

The substance of Mr. Ebro's testimony is that there is an international standard of care involved in the safe operation and maintenance of resort/hotel pools like the one at Waterfront City. The standard is embodied in the relevant ANSI/NSPI guidelines which have been adopted worldwide. They are also incorporated by reference in the franchise agreement between Choice and its international representative, P.T. Qualita Indah Hotels, and the resort owner, P.T. Marina City Development. That franchise agreement also required that all applicable local laws, codes and regulations relating to resort pool

operation, be followed. According to Mr. Ebro, there was such a local law in effect, Indonesian Regulation 061, which mirrored the ANSI/NSPI guidelines in these regards.

He went on to conclude that the conduct of Choice, directly and indirectly, violated those standards of care which proximately caused Chan Young to nearly drown. Had certain changes been made in the design or construction of the pool, the accident could have been avoided. At the very least, water safety personnel, in the form of lifeguards, should have been present, or the guests should have been notified of and warned about the hazards in question. Finally, Mr. Ebro opined that Chan Young's parents were not at fault in any way and that their actions were reasonable under the circumstances.

Choice does not question whether Mr. Ebro is competent to testify as an expert in the field of aquatic safety based upon his education, training or experience. Instead, the gist of that objection is that Mr. Ebro is not familiar with the appropriate standards of care applicable to resort pool operation in Indonesia. Choice also contends that his testimony should be barred because

it is based upon uninformed speculation, not evidence in the record raised. Nor is Mr. Ebro's testimony as to his view of the propriety of the actions of Chan Young' parents relevent and he is not qualified to so testify as a result.

Obviously the Lees disagree. They argue that Mr. Ebro is qualified as an expert by reason of his education, training and experience to opine as to the appropriate standards of care. Those standards are incorporated into the ANSI/NSPI guidelines as referenced above, followed internationally in general and in Indonesia in particular, by virtue of Regulation 061. His opinions are not speculative the Lees contend, but are reasonable inferences drawn from evidence in the record. Any other objections noted by Choice go to the weight of the evidence, not its admissibility. Mr. Ebro therefore meets the test of admissibility under DRE 702 and *Daubert.*

DISCUSSION

Applicable Law

As indicated above, the defendant's motion is based upon DRE 702, which states:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

This rule is identical to its federal counterpart, Federal Rule of Evidence 702, which was first interpreted by the United States Supreme Court in *Daubert* as it applied to scientific experts. It was extended in *Kumho Tire Co., Ltd. v. Carmichael*[5] to witnesses with technical and other specialized knowledge testifying under this rule. The Delaware Supreme Court has adopted those

[5] 526 U.S. 137 (1999).

interpretations.[6]

As stated above, the Delaware Supreme Court has clearly embraced *Daubert*. Prior to the adoption of the Delaware Rules of Evidence, our Supreme Court consistently held that *Frye* was not the sole criteria to be used in considering the admissibility of expert testimony.[7] It has, consistent with *Daubert,* formulated the test of admissibility via Rule 702 as follows:

> 1) the witness is qualified as an expert by knowledge, skill, experience, training or education;
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> 2) the evidence is relevant and reliable;
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> 3) the expert's opinion is based upon information reasonably relied upon by experts in the particular field;
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> 4) the expert testimony will assist the trier of fact to understand the evidence

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[6] *Goodridge*, 845 A.2d at 503 (citing *Eskin*, 842 A.2d at 1227). *See also Cunningham*, 689 A.2d at 1193 (citing *Nelson*, 628 A.2d at 74).

[7] *Id.*

or to determine a fact in issue; and

5) the expert testimony will not create unfair prejudice or confuse or mislead the jury.[8]

It is the party seeking to introduce the expert evidence that has the burden of proving its admissibility.[9]

As noted above, Choice does not challenge Mr. Ebro's qualifications to testify generally within his area of expertise, i.e., aquatic safety and pool operation. Nor is Choice's objection based on relevancy or that the evidence is not of the kind reasonably relied upon by experts in that field. It is instead focused upon the reliability of the opinions he offers along with the methodology employed to form them. Choice also seems to suggest that the opinions in question will not assist the trier of fact to understand the issues being presented, and may in fact confuse the jury.

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[8] *Id.*

[9] *Eskin*, 842 A.2d at 1232.

Reliability

The test for determining the reliability of expert scientific evidence in this regard is well settled, but is not applicable in every case. The trial judge enjoys a wide latitude to use other factors to evaluate reliability, which not only applies to the conclusions, but also to the methodology employed to reach them. The key is whether the expert has sufficient knowledge to assist the jurors in deciding the particular issues in the case. The Delaware Supreme Court has held that:

> [T]he trial judge's inquiry should include whether the proffered expert and the purported "field of expertise" itself can produce an opinion that is sufficiently informed, testable and, in fact, verifiable on an issue to be determined at trial. Even though an expert may be qualified to opine within a recognized "field," that fact alone does not automatically guarantee reliable, and therefore admissible, testimony. It is critical that a trial judge be satisfied that any *generalized* conclusions are applicable to the *particular* facts of the case.[10]

Again, the trial judge's approach must be flexible in

[10] *Goodridge*, 845 A.2d at 503. *See also Podrasky v. T & G., Inc.*, 2004 Del. Super. LEXIS 396, at *24 (citing *Goodridge*).

determining the reliability of an expert's testimony as well as the methodology used to arrive at the proffered opinion.[11] That review must include the relevant factors of the case before the court and should not be limited to any one factor in particular.[12] It is within this framework that the Court turns to the instant challenge.

The first area of concern is Mr. Ebro's testimony regarding the standard of care based upon the ANSI/NSPI guidelines. He opines that there is an international standard of care which has been adopted in Indonesia. However, he does not state by whom, by what process or when that ratification occurred. The absence of that information is critical in light of the fact, which Mr. Ebro concedes, that ANSI/NSPI itself states that the standards in question are recommendations only. Furthermore, the organizational literature clearly advises that their existence does not prevent anyone from

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[11] *Podrasky*, 2004 Del. Super. LEXIS 396, at *44 (citing *Farmers Truck Insurance v. Magnetek, Inc.*, 2002 U.S. Dist. LEXIS 27672 (D. Col.), at 2.

[12] *Id.* (citing *Kumho Tire*, 526 U.S. at 152 and *M.G. Bancorporation v. Le Beau*, 737 A.2d 513, 522 (Del. 1998)).

using a product or service that does not conform with those guidelines.

Mr. Ebro does not know if the ANSI/NSPI guidelines in question exist in any language other than English, or what language or languages are spoken in Indonesia in any event. Nor does he know whether the aforementioned guidelines were ever provided to any resort pool operator in that country. Notwithstanding the fact that he traveled to Indonesia and Singapore as a part of his investigation, he did not discuss the subject with, or even attempt to contact, any resort operators or government officials that might be responsible for such governance. Simply put, Mr. Ebro has not been able to establish that the ANSI/NSPI guidelines have been adopted by or imposed upon resort pool operators in Indonesia or that they were aware of the existence of those guidelines.[13]

Second, similar deficiencies exist in connection with

[13] The same conclusion holds true to the obligation of Choice franchisees to follow local authority and the ANSI/NSPI guidelines in operating resort pools. Again, Mr. Ebro did not make any effort to contact anyone associated with Waterfront City to ascertain if they were aware of that authority as well as whether it applied to and/or was followed by the operators of that resort.

his reliance on what is purported to be Regulation 061. Mr. Ebro made no attempt to ascertain whether the regulation was applicable to resorts such as Waterfront City or that there was no other related authority that might impact upon the standard, if it applied at all. He could not verify that the translation was complete, or accurate, only that is was purportedly prepared by what appeared to be an attorney in Indonesia. There was no indication as to whether the regulation was or was not enforced, or that the resort owners even knew of its existence.

Indeed, Mr. Ebro did not have any knowledge of Indonesian law at least up to the date of his deposition, April 4, 2005. He thought that it would be better to wait and allow those representing the Lees to obtain that information for him. Nor did anyone inform him of the existence of Regulation 061 until June 14, 2005. That was approximately ten months after he was retained by the Lees and more than three months after he returned from his trip to Indonesia and Singapore. It was also one day before the start of the *Daubert* hearings and four days

before trial was then scheduled to start.

Third, in addition to the deficiencies listed above, the methodology employed when Mr. Ebro traveled to Indonesia and Singapore to survey resorts in the area in and around Batam, Indonesia, was at best, questionable. The following exchange is particularly revealing in this regard:

> Q. And what do you do, Mr. Ebro, to develop local expertise as an aquatic safety expert?
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> A. I find out the local regulatory body, be it a health department or state or government, find out if those kinds of codified language, if you will, or law kind of language exists.
>
> And I go into, as to what the local - like here we have a lot of chapters, swimming pool kind of subchapters of ANSI/NSPI. I look to those that provide the local flavor and local interaction and consensus. Then, of course, I apply the standards that we've been speaking about, the ANSI and NSPI.
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> Q. Is travel part of your methodology?
>
> A. Oh, yes.
>
> Q. What's involved in that?
>
> A. I try to get up to speed on the facts, equip myself with the equipment

> I feel I'm going to need to conduct the survey, and I proceed to made [sic] logistics arrangements and go to the site and make measurements and follow my checklist.[14]

Clearly Mr. Ebro did not follow the procedure that he would normally employ when trying to familiarize himself with local practices or customs. Although he had not been previously involved professionally in that part of the world, Mr. Ebro did not contact any operators of the resorts surveyed. Nor was there any attempt to ascertain whether there were any other laws, customs or regulations which applied, or if they existed, whether they were enforced.[15] And, it appears that until he arrived in Indonesia, Mr. Ebro believed that Singapore, which as noted above, is an independent republic, was a part of Indonesia and that Regulation 061 therefore applied to the resorts in Singapore as well.[16]

Of the nine resorts inspected, as Mr. Ebro noted, the

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[14] Daubert Hr'g Tr. 135-136, July 6, 2005.

[15] *Id*. at 87-91. Mr. Ebro arrived in Indonesia during a weekend and departed Batam after spending two days there. Regulation 061 was sent to him a little more that 100 days after he began his Indonesia/Singapore sojourn during the first week of March 2005.

[16] *Id*. at 84-85.

other eight were just as deficient in terms of safety, if not more so, as Waterfront City. The other eight exhibited the same types of failings that he charged against Waterfront City, that is, no lifeguards or chairs in all but two of the resorts, unmarked "drop offs" as well as monochromic basin bottoms and walls. It appeared that Mr. Ebro believed that none of the establishments he surveyed met what he considered to be the applicable standard of care.[17]

Mr. Ebro opines that failing to have lifeguards at Waterfront City was a breach of the applicable standard of care. If they had been present, they would have recognized Chan Young's actions as distress and reacted immediately to save his life. Yet, Mr. Ebro incredulously opines in his file notes that the lifeguards he did observe at two of the resorts he

[17] *Id.* at 91-96. Most telling are the comments made by Mr. Ebro in his file notes where he indicated that he had both good news and bad news to relate to his Indonesian liaison. The good news he related was that by United States pool safety standards, Waterfront City was deficient in many respects. The bad news he conveyed was that there did not appear to be a safety standard in Indonesia comparable to that found in the United States. He went on to record his conclusion that none of the other large hotels or posh resorts practiced any better safety than Waterfront City. To be precise, he concluded that "the others had greater hazards."

surveyed were poorly trained and were nonexistent at the other seven resorts.[18] Nor does he state how many lifeguards there should have been or where they should have been stationed. Lastly, during the course of his deposition, Mr. Ebro conceded that he was unaware of the existence of any standards that required Waterfront City to have a lifeguard on duty at its pool on the date Chan Young was injured.[19]

Aside from those apparent contradictions, such testimony is very speculative to say the least. It also presupposes a knowledge of human behavioral science which is not apparent to the Court from his stated education, training and experience. How Mr. Ebro gained that knowledge is not apparent, again, since he did not have any contact with any resort operators or government officials charged with the responsibility of regulating resorts or resort pool operations.

The Lees, as the parties seeking to introduce Mr. Ebro's testimony, have the burden of establishing that it

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[18] *Id.* at 96.

[19] Ebro Dep. 93, April 4, 2005.

comports with the applicable law. They cannot meet that burden on the record that currently exists. No matter how it is viewed, the proposed testimony by Mr. Ebro is substantially flawed and cannot be deemed reliable. The opinions expressed by him are inconsistent with what research he did conduct and the methods so employed were woefully deficient even when compared to practice he normally employs when investigating a case.

Mr. Ebro may be qualified to opine generally regarding aquatic safety, but his personal experience, training and education, as well as his investigation in this case thus far, do not qualify him to opine relative to the appropriate standard of care in that part of the world. Stated differently, the means used to reach his opinions as well as the opinions themselves are not reliable. They would not assist a jury in the manner permitted by DRE 702 and *Daubert*. It is also apparent that the evidence proffered would likely lead to jury confusion given the paucity of the information about what standards actually governed the operation of resort pools in Indonesia.

What Mr. Ebro said about the existence of an international standard may or may not be accurate. However, he cannot state with any reasonable degree of certainty what standard of care governed the operation of resort swimming pools in Batam, Indonesia on the date Chan Young was injured. The standard remains undefined. If he cannot testify as to the applicable standard of care, he cannot testify as to any breach of whatever standard might exist. As a result, the proposed testimony does not qualify as expert testimony for purposes of DRE 702.[20]

[20] Given these conclusions, it is unnecessary to reach the remainder of the objections to the testimony of Mr. Ebro. The Court notes, in any event, that the majority of those protestations, would seem to go to their weight, not their admissibility via DRE 702. However, Mr. Ebro's opinion as to the appropriateness of the conduct of Chan Young's parents under the circumstances existing at the time of the accident, presents a different situation. It is not a subject that would appear to need expert explanation, or upon which Mr. Ebro has demonstrated any expertise, if the Court were to rule otherwise.

CONCLUSION

For the foregoing reasons, the motion of Choice Hotels International, Inc. is granted. The testimony of Mr. Thomas C. Ebro may not be presented at the trial of this action as to the existence or definition of the standard of care applicable to the operation and maintenance of resort swimming pools in Indonesia.

IT IS SO ORDERED.

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Charles H. Toliver, IV
Judge, Superior Court